

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PATTI DONNER RUBIN, a Florida resident, )  
)  
Plaintiff, )  
vs. )  
THE SCOTTS COMPANY LLC, an Ohio )  
limited liability company, )  
Defendant. )

---

Case No.: 2:09-cv-02419-GMN-VCF

**ORDER**

Pending before the Court is the Motion for Summary Judgment (ECF No. 86) filed by Defendant The Scotts Company LLC (“Defendant”). Plaintiff Patti Donner Rubin (“Plaintiff”) filed a Response (ECF No. 97) and Defendant filed a Reply (ECF No. 100).

**I. BACKGROUND**

Plaintiff Patti Donner Rubin (“Plaintiff”) is the co-inventor and sole assignee of United States Patent No. 7,587,856 (“the ’856 Patent”), entitled “Compressed Growing Medium.” U.S. Patent No. 7,587,856, at [75], [73] (filed Aug. 25, 2006). The ’856 Patent is generally directed to “[a] growing medium [that] includes a bulking agent<sup>1</sup> compressed at a volume-to-volume ratio ranging from about 7:1 to about 10:1, being substantially free of a water-soluble binder material.” *Id.* at [57].

Defendant The Scotts Company LLC (“Defendant”) is an Ohio limited liability corporation that makes, sells, and distributes garden and lawn products throughout the United States. (Compl. ¶ 2.) Plaintiff accuses Defendant of manufacturing, using, offering for sale, and selling the Scotts Turf Builder EZ Seed product (“Accused Product” or “EZ Seed”) of

---

<sup>1</sup> The written description of the ’856 Patent provides several examples of “bulking agents,” including coir and peat. ’856 Patent at col.2 ll.48–54. Merriam-Webster dictionary defines “coir” as “a stiff coarse fiber from the outer husk of a coconut.” *Merriam-Webster’s Collegiate Dictionary* 241 (11th ed. 2004).

1 directly and literally infringing the '856 Patent. (Compl. ¶¶ 15–21.) Specifically, Plaintiff  
 2 asserts that Defendant's accused product infringes claims 1–3, 5, 9–10, 12, 15–20, and 22 of  
 3 the '856 Patent under 35 U.S.C. § 271(a). (Stover Aff. Ex. 1, at 1:25–26, ECF No. 88-2.)

4 Asserted claims 1 and 15 are the two independent claims of the '856 Patent. '856 Patent  
 5 col.10 ll.55–63; col.12 ll.3–9. Claim 1 recites a growing medium as follows:

6 1. A reground growing medium, comprising:  
 7 a bulking agent, wherein a particle size of said reground growing medium is less  
 8 than 0.4 inches in mean diameter; and  
 9 wherein said growing medium is compressed at a volume-to-volume ratio from  
 10 an initial ratio of less than 3:1 to a ratio ranging from 7:1 to about 10:1 and then  
 11 reground without reducing said volume to volume ratio to form an expanding  
 12 soil mixture.

13 *Id.* at col.10 ll.55–63. Asserted claims 2, 3, 5, 9, 10, and 12 all depend from independent  
 14 claim 1. *Id.* at col.10 l.64–col.11 l.26. In contrast, claim 15 recites a method of making a  
 15 growing medium as follows:

16 15. A method of making a growing medium to form an expanding soil mixture,  
 17 comprising: compressing a dehydrated growing medium at a volume-to-volume  
 18 ratio from an initial ration of less than 3:1 to a ratio ranging from 7:1 to about  
 19 10:1; and regrounding said compressed growing medium to a varying particle size  
 20 of less than 0.4 inches in mean diameter.

21 *Id.* at col.12, ll.3–9. Asserted claims 14–20 and 22 all depend from independent claim 15.

22 The Court previously issued its Order construing twenty-seven claim terms. (Dec. 9,  
 23 2011 Order, ECF No. 69.) The parties agreed on the proper constructions for twenty-one claim  
 24 terms and disputed the constructions for the remaining six claim terms. (*Id.* at 5:1–6:20; 18:24–  
 25 9.) After the Court issued its Claim Construction Order, Defendant filed the instant motion  
 seeking summary judgment of non-infringement of all asserted claims and invalidity of asserted  
 claims 15–20 and 22. (*See* Mot. for Summ. J. 5:7–27, ECF No. 86.)

## 24 **II. LEGAL STANDARD**

25 The Federal Rules of Civil Procedure provide for summary adjudication when the  
 pleadings, depositions, answers to interrogatories, and admissions on file, together with the

1 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant  
2 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Because a motion for  
3 summary judgment is a purely procedural question not pertaining to patent law, this Court  
4 applies the law of the regional circuit, the Ninth Circuit, when determining whether a genuine  
5 dispute exists as to any material fact. *CollegeNet, Inc. v. ApplyYourself, Inc.*, 418 F.3d 1225,  
6 1230 (Fed. Cir. 2005).

7 Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty*  
8 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is a  
9 sufficient evidentiary basis on which a reasonable fact-finder could rely to find for the  
10 nonmoving party. *See id.* “The amount of evidence necessary to raise a genuine issue of  
11 material fact is enough ‘to require a jury or judge to resolve the parties’ differing versions of  
12 the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First*  
13 *Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). “Summary judgment is  
14 inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party,  
15 could return a verdict in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521  
16 F.3d 1201, 1207 (9th Cir. 2008). A principal purpose of summary judgment is “to isolate and  
17 dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24  
18 (1986).

19 In determining summary judgment, a court applies a burden-shifting analysis that  
20 depends on which party filed the motion and which party bears the burden of proof. When the  
21 nonmoving party bears the burden of proving the claim or defense, the moving party can meet  
22 its burden in two ways: (1) by presenting evidence to negate an essential element of the  
23 nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a  
24 showing sufficient to establish an element essential to that party’s case on which that party will  
25 bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party  
fails to meet its initial burden, summary judgment must be denied and the court need not

1 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
2 60 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing  
4 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*  
5 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
6 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
7 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
8 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
9 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). However, the nonmoving party “may not rely on  
10 denials in the pleadings but must produce specific evidence, through affidavits or admissible  
11 discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,  
12 1409 (9th Cir. 1991), and ““must do more than simply show that there is some metaphysical  
13 doubt as to the material facts.”” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting  
14 *Matsushita*, 475 U.S. at 586). “The mere existence of a scintilla of evidence in support of the  
15 plaintiff's position will be insufficient.” *Anderson*, 477 U.S. at 252. In other words, the  
16 nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations  
17 that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).  
18 Instead, the opposition must go beyond the assertions and allegations of the pleadings and set  
19 forth specific facts by producing competent evidence that shows a genuine issue for trial. *See*  
20 *Celotex Corp.*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the  
22 truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
23 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn  
24 in his favor.” *Id.* at 255. Nevertheless, if the evidence of the nonmoving party is merely  
25 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–  
50.

### 1 **III. DISCUSSION**

2 In this case, Defendant, seeks summary judgment of non-infringement and invalidity of  
3 the asserted claims of the '856 Patent. Because the Court finds that summary judgment of non-  
4 infringement is appropriate, the Court need not reach Defendant's invalidity arguments. In  
5 patent infringement cases, "[t]he patentee bears the burden of proving infringement by a  
6 preponderance of the evidence." *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1123 (Fed.  
7 Cir. 1985). Because Plaintiff, the nonmovant, bears the burden of proof, Defendant need only  
8 demonstrate that Plaintiff failed to make a showing sufficient to establish an element essential  
9 to Plaintiff's claim for direct, literal patent infringement. *See Celotex Corp.*, 477 U.S. at 323-  
10 24.

#### 11 **A. Non-infringement**

12 "To establish infringement of a patent, every limitation set forth in a claim must be  
13 found in an accused product or process exactly or by a substantial equivalent." *Becton*  
14 *Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed. Cir. 1990) (citing *Corning Glass*  
15 *Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1259 (Fed. Cir. 1989)). Therefore,  
16 Defendant can carry its initial burden "by pointing out that the patentee failed to put forth  
17 evidence to support a finding that a limitation of the asserted claim was met by the structure in  
18 the accused devices." *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1578 (Fed. Cir. 1989). If  
19 Defendant satisfies this burden, the burden shifts to Plaintiff, the nonmovant, to establish the  
20 existence of a genuine issue of material fact by "produc[ing] specific evidence . . . to show that  
21 the dispute exists." *See Bhan*, 929 F.2d at 1409.

22 In its Motion, Defendant asserts that two primary limitations are absent from the accused  
23 EZ Seed product. Defendant first argues that its EZ Seed is not "compressed at a volume-to-  
24 volume ratio from an initial ratio of less than 3:1 to a ratio ranging from 7:1 to about 10:1," as  
25

1 required by Independent Claim 1, Independent Claim 15<sup>2</sup>, and the claims that depend  
 2 therefrom. Thus, Defendant argues that, because this limitation is recited in all asserted claims,  
 3 the absence of this limitation precludes a finding of infringement.

4 Defendant also asserts that its EZ Seed product is, at no time, “reground *without*  
 5 *reducing said volume to volume ratio*,” as required by Independent Claim 1 and the claims that  
 6 depend therefrom. However, because the Court finds that Plaintiff has failed to meet her  
 7 burden of establishing a genuine issue of material fact as to Defendant’s first asserted basis for  
 8 non-infringement, the Court need not reach Defendant’s alternative basis for non-infringement  
 9 of asserted claims 1–3, 5, 9, 10, and 12.

10 ***1. “compressed . . . to a ratio ranging from 7:1 to about 10:1”***

11 Defendant states that the compression step of its process results in a final ratio of “at  
 12 least 13.5:1 compared to precompressed (loose) coir.” (Mot. for Summ. J. 3:5–6, ECF No. 87;  
 13 Bertin Aff. ¶¶ 14–22, ECF No. 90-3.) In contrast, claims 1 and 15 in Plaintiff’s ’856 Patent  
 14 recite a final compression volume-to-volume ratio in the range of “7:1 to about 10:1.” ’856  
 15 Patent col.10, l.61, col.12, ll.6–7. Because the final volume-to-volume compression ratio of  
 16 Defendant’s EZ Seed product is outside of the claimed range, Defendant asserts that Plaintiff  
 17 has failed to establish that every limitation in the asserted claims is present in the Accused  
 18 Product.

19 Defendant calculates its compression ratio of 13.5:1 by comparing the density of the  
 20 precompressed coir, 0.08 g/cm<sup>3</sup>, with the average density of its compacted continuous coir  
 21

---

22  
 23 <sup>2</sup> Although the language of Claim 15 is not identical to Claim 1, Independent Claim 15 does recite a similar  
 24 limitation. *Compare* ’856 Patent, col.10, l.59–61 (“wherein said growing medium is compressed at a volume-to-  
 25 volume ratio from an initial ratio of less than 3:1 to a ratio ranging from 7:1 to about 10:1”) *with* ’856 Patent,  
 col.12, l.3–7 (reciting a “method of making a growing medium” which includes the step of “compressing a  
 dehydrated growing medium at a volume-to-volume ratio from an initial ration [sic] of less than 3:1 to a ratio  
 ranging from 7:1 to about 10:1”). Regardless of the exact wording, both claims require a compression step  
 where the final volume-to-volume ratio is within the range of 7:1 to about 10:1.

1 sheet, 1.08 g/cm<sup>3</sup>.<sup>3</sup> (Bertin Aff. ¶ 19.) Defendant explains that the initial density value used in  
2 these calculations is consistent with both the public literature on the subject and with  
3 Defendant's measurements of the starting coir received from its suppliers. (*Id.* ¶¶ 20-21 ("The  
4 value [] used in [the] calculations for the density of precompressed (loose) coir is consistent  
5 with the values [Defendant] measured at the third party coir suppliers.").)

6 Accordingly, Defendant has successfully carried its initial burden. Defendant has  
7 demonstrated that Plaintiff has failed to show that the Accused Product is "compressed at a  
8 volume-to-volume ratio from an initial ratio of less than 3:1 to a ratio ranging from 7:1 to about  
9 10:1" as required by Claim 1 of the '856 Patent and the claims that depend therefrom.  
10 Similarly, Defendant successfully demonstrates that Plaintiff has failed to show that  
11 Defendant's process of producing its EZ Seed product includes a step of "compressing a  
12 dehydrated growing medium at a volume-to-volume ratio from an initial ration [sic] of less than  
13 3:1 to a ratio ranging from 7:1 to about 10:1" as required by Claim 15 of the '856 Patent and  
14 the claims that depend therefrom.

15 Thus, the burden now shifts to Plaintiff to establish that a genuine issue of material fact  
16 exists as to whether this claim limitation is present in the Accused Product. Plaintiff attempts  
17 to carry its burden by asserting that Defendant "processes the coir it receives from its suppliers  
18 to remove contaminates such as sand, rocks, and metal, to produce a cleaned coir" and that this  
19 processing "will yield a higher bulk density" than Defendant states in its motion. (Resp. 6:7-10,  
20 ECF No. 97 (internal quotation marks omitted).) However, Plaintiff's motion lacks any  
21 reference to specific evidence in the form of measurements from the production of Defendant's  
22 EZ Seed product. Similarly, Plaintiff argues that "the bulk density of uncompressed coir will  
23 vary greatly on the make-up of the coir and the degree of settling of the coir." (*Id.* 6:18-19.)

---

24  
25 <sup>3</sup> Defendant further notes that the observed density for the compacted sheet of coir ranged from 1.03 g/cm<sup>3</sup> to 1.15 g/cm<sup>3</sup>. Thus, based on a precompressed density of 0.08 g/cm<sup>3</sup>, the resulting compression ratio of Defendant's product is outside the claimed range at all of the measured final density values.



1 Yet, once again, absent from Plaintiff's Response, and the exhibits attached thereto, is any  
2 *evidence* indicating that any such settling of uncompressed coir actually occurs in Defendant's  
3 process and, as a result, alters the compression ratio of *Defendant's process* such that the  
4 compression ratio falls within the claimed range. Plaintiff endeavors to overcome this  
5 deficiency by relying on an article entitled "*Physical Characteristics of Coir Pith as a Function*  
6 *of its Particle Size to be Used as Soilless Medium*," which acknowledges the existence of coir  
7 with the "rather high" bulk density of 0.15g/cm.<sup>4</sup> However, merely acknowledging the  
8 existence of bulk coir with densities sufficiently high to result in a final compression ratio  
9 within the claimed range, without tying this allegation to Defendant's product and process, is  
10 inadequate.

11 At bottom, Plaintiff's mere assertions are insufficient. Plaintiff's Response, Affidavits,  
12 and Exhibits lack any evidence of calculations based on measurements taken from the Accused  
13 Product or process that establishes a genuine issue as to whether Defendant's EZ Seed product  
14 is "compressed at a volume-to-volume ratio from an initial ratio of less than 3:1 to a ratio  
15 ranging from 7:1 to about 10:1 . . . ." '856 Patent col.10, ll.59–61; *see also* '856 Patent col.12,  
16 ll.4–7. Rather, as Defendant aptly noted, Plaintiff's arguments "falsely presume[] that 'the bulk  
17 density of uncompressed coir' is a material issue of fact." (Reply 4:20–21, ECF No. 100.) In  
18 reality, the only bulk density that is material to this case is the bulk density of the  
19 uncompressed coir that Defendant uses in the production of the Accused Product.

20 Accordingly, Plaintiff has failed to carry her burden of producing specific evidence that  
21 demonstrates the existence of a genuine dispute as to the compression ratio that results from the  
22 compression of the bulk coir that *Defendant uses* when producing the accused EZ Seed product.

---

24 <sup>4</sup> Defendant has also filed a Motion to Strike this article because it "is not probative evidence that can give rise to  
25 a genuine issue of material fact" and based on Plaintiff's failure to produce the article during fact discovery.  
(Mot. to Strike 1:10–14, ECF No. 102.) Even considering this article, Plaintiff has still failed to establish a  
genuine issue of material fact. Because the Court finds that summary judgment should be granted in Defendant's  
favor, the Court **DENIES** Defendant's Motion to Strike (ECF No. 102) as **MOOT**.



1 (See *id.* at 4:21–23.) For these reasons, the Court concludes that Plaintiff has not shown that  
2 there is more than “some metaphysical doubt as to the material facts.” See *Matsushita*, 475 U.S.  
3 at 586.

4 Finally, Plaintiff asserts that, even to the extent the compression ratio for Defendant’s  
5 product is 13.5:1, a question of fact remains as to whether this ratio falls within the range of  
6 “7:1 to *about* 10:1.” However, construing the meaning of the term “about” in the context of the  
7 ’856 Patent is a matter of law for the Court. *Markman v. Westview Instruments, Inc.*, 517 U.S.  
8 370, 372 (1996).

9 “The word ‘about’ does not have a universal meaning in patent claims, and its meaning  
10 depends on the technological facts of the particular case.” *Cohesive Techs., Inc. v. Waters*  
11 *Corp.*, 543 F.3d 1351, 1368 (Fed. Cir. 2008). Plaintiff’s sole support for this proposed  
12 expansion of “about” 10:1 consists of the inventor’s post-hoc, self-serving statements. (Resp.  
13 8:28–9:6, ECF No. 97.) Only now does Plaintiff assert that she intended the ’856 Patent to  
14 cover any compression ratio where “burnishment” did not occur.<sup>5</sup> (*Id.*) However, *Cohesive*  
15 *Technologies* advises that courts must look to the purpose of the range when giving meaning to  
16 the term “about.” 543 F.3d at 1368. The ’856 Patent lacks any reference to any compression  
17 ratio that exceeds 10:1. Plaintiff’s own testimony further confirms that she limited her claims  
18 to about 10:1 because wafers that had been compressed beyond 10:1 failed to expand  
19 adequately when exposed to water. (See Rubin Dep. 280:6–281:7, ECF No. 90-1.) Specifically,  
20 Plaintiff stated that “[w]e never saw it outside that limit to work as well.” (*Id.* at 282:2–6.)  
21 Thus, it cannot be said that Plaintiff intended her patent claims to cover compression ratios that  
22 she had previously determined would not result in a functional product. Finally, the Court  
23 notes that Defendant’s compression ratio, 13.5:1, exceeds the top end of the claimed range by  
24

---

25 <sup>5</sup> Plaintiff notes that when the coir was compressed too much it became burnished and, when the coir was  
burnished, the coir would not expand effectively when exposed to water. (Resp. 8:28–9:2, ECF No. 97.)

1 more than the entire range itself. The Court concludes that such a drastic expansion of the term  
2 “about” 10:1 would be improper.

3 For these reasons, the Court rejects Plaintiff’s assertion that she should survive  
4 Defendant’s Motion for Summary Judgment because 13.5:1 falls within the range of “7:1 to  
5 about 10:1.”

6 **IV. CONCLUSION**

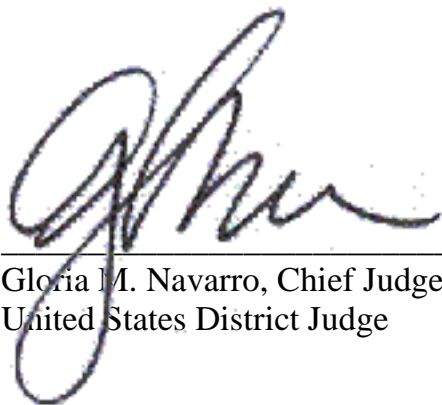
7 **IT IS HEREBY ORDERED** that Defendant’s Motion for Summary Judgment (ECF  
8 No. 86) is **GRANTED**.

9 **IT IS FURTHER ORDERED** that Defendant’s Motion to Strike (ECF No. 102),  
10 Defendant’s Motion in Limine to Exclude Testimony of Plaintiff’s Damages Expert (ECF No.  
11 111) and Defendant’s Motion in Limine to Exclude Testimony of Plaintiff’s Infringement  
12 Expert (ECF No. 117) are all **DENIED as MOOT**.

13 The Clerk of the Court shall enter judgment accordingly.

14 **DATED** this 24th day of January, 2014.

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



---

Gloria M. Navarro, Chief Judge  
United States District Judge